Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

THEODORE ROBINSON, SR.,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

On Appeal From the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

APPENDIX OF EXHIBITS

MAURICE S. BELL
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Montgomery, Al 36104
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Counsel of Record
For Petitioner

47pp

EXHIBITS

The following exhibits contain both motions filed by your petitioner and orders of the courts in response thereto. In order to comply with the pagination/printing requirements of rule 33.1(c) **Federal Rules of Procedure,** all motions and orders issued by the United States District Court for the Middle District of Alabama, Northern Division and the United States Court of Appeals for the Eleventh Circuit have been re-paginated.

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 92-66-N
	)	
THEODORE ROBINSON, SR.	)	

O R D E R

Now before the Court is defendant's motion to suppress filed March 20, 1992 and amended March 26, 1992. The government responded to the motion on April 1, 1992. Both parties have filed briefs in support of their positions. On April 7, 1992, the Court conducted a hearing on defendant's motion to suppress. for the following reasons, the court determines that defendant's motion is due to be denied.

Defendant's motion asks the Court to suppress the evidence removed from the premises and curtilage of defendant's residence. As grounds for his motion, defendant asserts (1) that the search of his property and seizure of the alleged contraband which occurred on or about January 31, 1992 were in violation of the Fourth Amendment of the Constitution of the United States since it was by use of a forward

looking infrared detector (FLIR); (2) that the search and seizure were in violation of 18 **U.S.C.** § 1385, known as the Posse Comitatus Act because uniformed members of the Alabama National Guard participated in the search and seizure; and (3) that the statements in the affidavit in support of the search warrant issued in this cause do not constitute probable cause.

The Court first considers whether the use of a FLIR without defendant's knowledge, consent or a valid search warrant was in violation of the Fourth Amendment of the United States Constitution. On January 17, 1992, a helicopter owned by the Alabama Department of Public Safety (DPS), operated by employees of DPS, and equipped with a FLIR flew over defendant's residence and directed its heat detection sensors toward defendant's house. The FLIR registers emanations of heat and indicates the intensity of heat emanating from a given source with gradations of light and dark. On January 17, 1992, the FLIR detected a greater amount of heat emanating from defendant's house than from other houses of comparable size in the area.

Defendant contends that because the gradations of light detected by the FLIR are not visible to the naked eye, the use of FLIR constitutes a warrantless search of defendant's house. The FLIR detects only the presence of heat emanations. The FLIR does not detect the source of the heat nor provide any information regarding activity

within an enclosed space such as defendant's house. Based on the information before it, the Court does not consider the use of the FLIR to be so intrusive as to constitute an unlawful search. Defendant argues that the use of the FLIR to detect heat emanations is analogous to capturing sound waves with bugging devices. This analogy ignores the nature of the information acquired by the different processes. The FLIR detects only the presence of heat. Bugging devices, on the other hand, capture more than the presence of sound; they detect the content of the speech and identity of the speaker.

Defendant further contends that the search and seizure conducted on January 31, 1992 violated the Posse Comitatus Act, 18 **U.S.C.** § 1385. Military involvement in a case must be "pervasive" in order to constitute a violation of the Posse Comitatus Act. **Hayes v. Hawes,** 921 F.2d 100 (7th Cir. 1990) (citing **United States v. Hartley,** 796 F.2d 112, 114 (5th Cir. 1986). Further, assistance by the military in civil investigations does not violate the Possee Comitatus Act where military participation does not "pervade the activities of civilian officials, and d[oes] not subject the citizenry to the regulatory exercise of military power." **United States v. Bacon,** 851 F.2d 1312, 1313 (11th Cir. 1988).

The evidence presented indicates that the two National Guardsmen present at the time of the search of defendant's residence and seizure of the alleged contra-

band were not used to execute the search nor to determine what to seize. Rather, the National Guardsmen followed the instructions of Alabama DPS Agent Charles West and assisted only in removing the alleged contraband from the premises. The evidence shows that the National Guardsmen present on January 31, 1992 did nothing other than assist in removing the alleged contraband from defendant's residence. This participation does not constitute a violation of the Posse Comitatus Act.

Moreover, even if this evidence was seized in violation of the Posse Comitatus Act, the exclusionary rule does not apply to evidence seized in violation of the Act, unless there are widespread and repeated violations of the Act. **United States v. Wolffs,** 594 F.2d 77, 85 (5th Cir. 1979). *See also* **Hayes v. Hawes,** 921 F.2d 100, 104 (7th Cir. 1990); **United States v. Hartley,** 678 F.2d 961, 978 n. 23 (11th Cir. 1982), *cert. denied* 459 &.S. 1170 (1983; **United States v. Garcia,** 672 F.2d 1349, 1368 n. 33 (11th Cir. 1982). Defendant alleges no widspread and repeated violations of the Posse Comitatus Act nor is there evidence of such violations. Even if defendant had established that the evidence was seized in violation of the Posse Comitatus Act, he has not alleged sufficient widespread violations to justify suppression of the evidence seized from his residence.

In addition, the statements in the affidavit given in support of the search warrant subsequently issued in this cause

do constitute probable cause. Defendant contends that the statements contained in the affidavit are conclusory and, as such, do not provide a basis for determining the existence of probable cause. Alabama DPS Narcotics Agent Charles West, who has investigated narcotics offenses for over 21 years and has been involved with search warrants pertaining to the indoor growing of marijuana, gave the affidavit in support of the search warrant. West states in his affidavit that defendant had ordered 30 high pressure sodium lamps from a firm in California which specializes in indoor growing equipment and hydroponics supplies and paid for the lamps with $7000 cashier's check. Defendant had purchased growing equipment from the company in 1990 as well. Based on his experience and training, West was aware that high pressure sodium lamps are used in the indoor growing of marijuana and that the lamps consume a large quantity of electricity and radiate much heat. West subpoenaed the records of the Dixie Electric Cooperative and learned that the electric consumption of defendant's residence was markedly higher than that of comparably-sized houses. For example, defendant used an average of 5,570 kilowatt hours for June, July and August and had an average bill of $410.89. Comparably-sized houses have electric bills ranging from $130 to $150 per month. In his affidavit, West stated that, on January 17, 1992, a helicopter equipped with a FLIR flew over defendant's residence and dected heat ema-

nating from the structure as described above. Several days later, West received information that no record of income tax returns filed by defendant could be found.

Probable cause exists where the facts and circumstances within the investigating agent's knowledge and which are reasonably trustworthy are sufficient to warrant the belief that an offense is being committed. **Brinegar v. United States,** 338 U.S. 160, 175-76 (1949). The Court does not consider the facts described by West to be conclusory statements. Rather, West gathered information from reliable sources and found that the facts conformed to a pattern consistent with the indoor cultivation of marijuana. West's affidavit, therefore, offers probable cause for issuing a warrant to search the premises and curtilage of defendant's residence.

Accordingly, the Court ORDERS that defendant's motion to suppress is DENIED.

DONE this 10th day of April, 1992.

/s/ TRUMAN HOBBS

TRUMAN HOBBS
UNITED STATES DISTRICT JUDGE

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
VS.	)	CR. NO. 92-66-N
	)	
	)	
THEODORE ROBINSON, SR.; and EVA H. ROBINSON	)	

O R D E R

This cause is now before the Court on the Motion to Suppress filed herein June 5, 1992, by Defendant, Theodore Robinson, Sr., requesting this Court to suppress "any and all statements made by [the Defendants], either written or oral, to any law enforcement officer."[1]

---

[1] The Court is referring to the Motion to Suppress filed June 5, 1992, by Defendant, Theodore Robinson, Sr. However, this Order will apply to both Defendants because on June 18, 1992, U.S. Magistrate Judge Coody granted the Motion to Adopt and Conform Applicable Motions of Co-Defendant filed June 16, 1992, by Defendant, Eva H. Robinson.

On June 17, 1992, U. S. District Judge Truman Hobbs ordered Mr. Robinson to "file forthwith notice of which statements he seeks to suppress and the grounds for his motion" [emphasis added]. Defendant, Theodore Robinson, Sr., having failed to respond to Judge Hobbs' June 17, 1992, Order and Defendant, Eva H. Robinson, having adopted all motions previously filed by her co-Defendant, it is ORDERED by this Court that the Motion to Suppress filed herein June 5, 1992, be, and the same is hereby, DENIED.

DONE this 1st day of July, 1992.

/s/ R. E. VARNER

R. E. VARNER
UNITED STATES DISTRICT JUDGE

EXHIBIT C

AO 245S(Rev.4/90)(M.D. Ala. rev.)
Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Middle District of Alabama
Northern Division

UNITED STATES OF AMERICA

v. Case Number
CR 92-66-N-001

THEODORE ROBINSON, SR.
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or
After November 1, 1987)

The defendant, THEODORE ROBINSON, SR., was represented by Donald E. Fazekas.

The defendant pleaded guilty to Counts I and II. Accordingly, the defendant is adjudged guilty of such counts, involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 841 (a) (1) and 18 USC 2	Controlled Substances Act Aiding Abetting	1/30/92	I
18 USC 924 (c)(1)	Gun Control Act	1/30/92	II

As pronounced on October 23, 1992, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the Clerk, U.S. District Court, a special assessment of $100, for Counts I and II, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 3rd day of November, 1992.

/s/ W. Harold Albritton
United States District Judge

Defendant's SSAN: 424-38-4985
Defendant's Date of Birth: 10/31/35
Defendant's Address: Route 1, 268Y; Union Springs, AL 36089

AO 245 S (Rev. 4/90) (M.D. Ala. rev.)
Sheet 2 - Imprisonment

Judgment—Page 2 of 4

Defendant: THEODORE ROBINSON, SR.
Case Number: CR 92-66-N-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 130 months. This term consists of terms of 70 months on Count I and 60 months on Count II to be served consecutively to the term on Count I.

The defendant shall be continued and under the same release conditions imposed by the U. S. Magistrate Judge on February 28, 1992 pending disposition of his appeal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ _____to_____

at_____, with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

AO 245S (REV. 4/90)(M.D.Ala. rev.)
Sheet 3 - Supervised Release

Judgment—Page 3 of 4

Defendant: THEODORE ROBlNSON, SR.
Case Number CR 92-66-N-001

SUPERVISED RELEASE

Upon release from imprisonment the defendant shall be on supervised release for a term of 4 years on Count I and 3 years on Count II, all such terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessments, costs or restitution

obligation, it shall be a condition of supervised release that the defendant pay as ordered any such fine, assessment, costs and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

4. The defendant shall submit to a drug test when ordered to do so by the Probation Officer. If determined necessary by the Probation Officer, the defendant shall participate in a substance abuse treatment program as directed by the Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any

person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245S (REV. 4/90)(M.D.Ala. rev.)
Sheet 7 - Statement of Reasons

Defendant: THEODORE ROBINSON, SR.
Case Number: CR 92-66-N-001

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:	
Total Offense Level:	26
Criminal History Category:	1
Imprisonment Range:	Ct. I: 63 months to 78 months Ct.II: 5 years
Supervised Release Range:	Ct. I: 4 to 5 years Ct.II: 2 to 3 years

Fine Range:	$ 12,500 to $ 2,000,000
Restitution:	S .00

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The Court finds that, pursuant to 18 **U.S.C.** Section 3663, there is no identifiable victim who incurred a financial loss as a result of this offense, therefore, an order of restitution is not entered.

The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by the application of the guidelines.

The Court finds that the sentence imposed is consistent with the factors stated at 18 U.S.C. Section 3553(a) to be considered in imposing a sentence.

EXHIBIT D

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62 F.3d 1325, U.S. v. Robinson, (C.A.11 (Ala.) 1995)

UNITED STATES of America, Plaintiff-Appellee,

v.

Theodore ROBINSON, Sr., Defendant-Appellant.

Nos. 92-6951, 92-6991.
United States Court of Appeals,
Eleventh Circuit.
Aug. 31, 1995.

Defendant pled guilty in the United States District Court for the Middle District of Alabama, No. CR-92-66-N(01), Truman M. Hobbs, J., to manufacture and possession of marijuana with intent to distribute and possession of firearms in connection with drug trafficking crime. He appealed the denial of his suppression motion. The Court of Appeals, Birch, Circuit Judge, held that: (1) aerial surveillance of occupied, private residence with infrared thermal detection was not an unconstitutional search, and (2) probable cause existed to search defendant's home.

Affirmed.

Edmondson, Circuit Judge, concurred and filed an opinion.

1. CRIMINAL LAW k1139
110 —
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139
Additional proofs and trial de novo.

[See headnote text below]

1. CRIMINAL LAW k1158(4)
110 —
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(4) Reception of evidence.

C.A.11 (Ala.) 1995.

Decisions on motions to suppress involve mixed questions of fact and law, and district court's factual findings are reviewed for clear error, while application of law to the facts is reviewed *de novo*, construing all facts in favor of the prevailing party.

2. SEARCHES AND SEIZURES k26
349 —
349I In General
349k25 Persons, Places and Things Protected
349k26 Expectation of privacy.

C.A.11 (Ala.) 1995.

Even if defendant demonstrates subjective expectation of privacy in the object of the search, he also must establish that this expectation is objectively reasonable; under this prong of *Katz*, inquiry is whether government's intrusion infringes upon personal and societal values protected by the Fourth Amendment. U.S.C.A. Const.Amend. 4.

3. SEARCHES AND SEIZURES k13.1
349 —
349I In General
349k13 What Constitutes Search or Seizure
349k13.1 In general.

C.A.11 (Ala.) 1995.

Use of infrared surveillance to ascertain heat intensity in a home is analogous, for Fourth Amendment purposes, to warrantless use of drug-detecting dogs to locate contraband. U.S.C.A. Const. Amend. 4.

4. SEARCHES AND SEIZURES k20
349 —
349I In General
349k13 What Constitutes Search or Seizure
349k20 Aerial surveillance.

C.A.11 (Ala.) 1995.

Aerial surveillance of defendant's home with infrared thermal detection was not an

unreasonable "search" violative of the Fourth Amendment; defendant lacked subjective expectation of privacy in the heat emitted from his home, and, even if defendant subjectively expected privacy, such expectation with regard to heat rising from his house was not objectively reasonable; moreover there was no intrusion whatsoever into defendant's home. U.S.C.A. Const.Amend.

See publication Words and Phrases for other judicial constructions and definitions.

5. SEARCHES AND SEIZURES k191
349 —
349VI Judicial Review or Determination
349k191 In general; conclusiveness of warrant in general.

C.A.11 (Ala.) 1995.

Whether search affidavit provides sufficient facts to establish probable cause is legal question subject to complete and independent appellate review. U.S.C.A. Const.Amend. 4.

6. SEARCHES AND SEIZURES k191
349 —
349VI Judicial Review or Determination
349k191 In general; conclusiveness of warrant in general.

C.A.11 (Ala.) 1995.

Great deference is accorded to judicial determination of probable cause to issue search warrant. U.S.C.A. Const.Amend. 4.

7. SEARCHES AND SEIZURES k113.1
349 —
349II Warrants
349k113 Probable or Reasonable Cause
349k113.1 In general.

C.A.11 (Ala.) 1995.

In issuing valid search warrant, judge is simply to make practical, commonsense decision whether, given all circumstances set forth in the affidavit, there is fair probability that contraband or evidence of the crime would be found in a particular place. U.S.C.A. Const.Amend. 4.

8. DRUGS AND NARCOTICS k188(2)
138 —
138II Narcotics and Dangerous Drugs
138II(D) Searches and Seizures
138k186 Search Under Warrant
138k188 Affidavits, Complaints, and Evidence for Issuance of Warrants
138k188(2) Probable cause in general.

C.A.11 (Ala.) 1995.

There was probable cause to believe that defendant was cultivating marijuana in his home, even without considering infrared thermal surveillance results, where defendant ordered thirty high-pressure sodium lights from company specializing in indoor growing equipment and paid for them with a cashier's check in excess of $7,000.00; defendant had purchased growing equipment from this company in past, investigating officer knew from experience and training that such lights are

used for indoor marijuana cultivation and that they consumed large amounts of electricity and radiated much heat, defendant's electric bills showed higher electrical consumption than that for houses of comparable size, visual inspection of the property showed attractive house with swimming pool in affluent neighborhood, yet no record of defendant's having paid state income taxes could be located. U.S.C.A. Const.Amend. 4.

9. SEARCHES AND SEIZURES k119
349 —
349II Warrants
349k115 Competency of Information; Hearsay
349k119 Citizens, victims, or officers.

C.A.11 (Ala.) 1995.
Opinions and conclusions of experienced agent regarding set of facts are properly considered in equation as to probable cause for issuing a search warrant. U.S.C.A. Const.Amend. 4.

10. DRUGS AND NARCOTICS k188(2)
138 —
138II Narcotics and Dangerous Drugs
138II(D) Searches and Seizures
138k186 Search Under Warrant
138k188 Affidavits, Complaints, and Evidence for Issuance of Warrants
138k188(2) Probable cause in general.

C.A.11 (Ala.) 1995.
Evidence of extremely high power bill

is one factor justifying issuance of warrant to search for indoor marijuana cultivation. U.S.C.A. Const.Amend. 4.

***1327** Habib Yazdtchi, Montgomery, AL, for Theodore Robinson, Sr.

Redding Pitt, U.S. Atty., Terry F. Moorer, Asst. U.S. Atty., Montgomery, AL, for appellee in No. 92-6951.

James E. Wilson, U.S. Atty., Terry F. Moorer, Asst. U.S. Atty., Montgomery, AL, for appellee in No. 92-6991.

Appeals from the United States District Court for the Middle District of Alabama.

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

BIRCH, Circuit Judge:

In this appeal, we decide whether aerial surveillance of an occupied, private residence with infrared thermal detection as an indication that marijuana is being cultivated inside is an unconstitutional search. The district court denied defendant's suppression motion. We AFFIRM.

I. BACKGROUND

In December, 1991, a Drug Enforcement Administration agent informed Agent Charles West of the Narcotics Division of the Alabama Department of Public Safety that thirty high-

pressure, sodium lights had been shipped from California to defendant-appellant Theodore Robinson, Sr.'s address in Tuskegee, Alabama. Agent West knew that such lights commonly are used by private individuals for growing marijuana indoors. (FN1) His investigation revealed that Robinson had ordered similar lights and hydroponic equipment in 1989 and 1990.

Additionally, subpoenaed utility records showed that Robinson's average kilowatt consumption of 5,570 hours and average utility statement of $410.89 for the months of June, July and August, 1991, had increased to nearly 10,000 kilowatt hours for December, 1991, and a utility statement of $562.00. Houses approximately the size of Robinson's generated monthly power statements between $130.00 and $150.00. Agent West's investigation of Robinson's financial status showed that Robinson owned an attractive house of approximately 2,800 square feet with a swimming pool and a nearby lot containing a new, prefabricated metal building. Although Robinson paid for the high-pressure, sodium lights with a cashier's check in excess of $7,000.00, Agent West found that the Alabama Department of Revenue had no record of Robinson's having filed income tax returns.

After collecting this information, Agent West directed a helicopter crew to conduct a Forward Looking Infrared Receiver ("FLIR"), thermal imaging examination (FN2) to compare the heat emanating from Robinson's house with

the intensity of the heat from surrounding objects. Robinson's home was considerably warmer than surrounding houses. Listing his investigatory findings, Agent West applied for a search warrant of Robinson's home. On January 31, 1992, Agent West and others executed the search warrant and found a major, indoor marijuana growing operation. (FN3) Two revolvers, a shotgun, and a ***1328** rifle also were found near the marijuana cultivation in Robinson's house.

A two-count indictment in the Middle District of Alabama charged Robinson with the manufacture and possession of marijuana with intent to distribute and with possession of firearms in connection with a drug trafficking crime. Robinson moved to suppress the marijuana seized from his home pursuant to the search warrant. Following a suppression hearing, the district court denied his motion. Robinson then pled guilty and was sentenced to serve 130 months of imprisonment followed by seven years of supervised release. On appeal, he contends that the FLIR search of his house constituted an illegal search under the Fourth Amendment, and that there were insufficient facts for probable cause to issue the warrant to search his house.

II. DISCUSSION

[1] Decisions on motions to suppress involve mixed questions of fact and law; "we review the district court's factual

findings for clear error, and its application of the law to the facts de novo." *United States v. Hromada, 49 F.3d 685, 688 (11th Cir.1995)*. Additionally, we construe all facts in favor of the prevailing party. Id. Robinson first argues that the warrantless FLIR surveillance of his occupied home violated his Fourth Amendment rights.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. In *United States v. Ford, 34 F.3d 992 (11th Cir.1994)*, we held that the ground surveillance of an unoccupied mobile home on leased land with a thermal infrared heat detector did not violate the Fourth Amendment. Three other circuits also have concluded that thermal infrared surveillance or FLIR is not an unconstitutional search. *United States v. Ishmael, 48 F.3d 850 (5th Cir.1995); United States v. Myers, 46 F.3d 668 (7th Cir.1995); United States v. Pinson, 24 F.3d 1056 (8th Cir.), cert. denied, — U.S. —, 115 S.Ct. 664, 130 L.Ed.2d 598 (1994)*. Robinson argues that this case is distinguished from *Ford* because it involves an occupied home, which specifically implicates the Fourth Amendment. As we explain, our *Ford* analysis also applies to the aerial FLIR surveillance of Robinson's home.

In *Ford*, we recognized that a party alleging an unconstitutional search under

the Fourth Amendment must establish both a subjective and an objective expectation of privacy to succeed. *Ford, 34 F.3d at 995 (citing Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967)* (Harlan, J., concurring)). The subjective component requires that a person exhibit an actual expectation of privacy, while the objective component requires that " 'the [privacy] expectation be one that society is prepared to recognize as "reasonable." ' " *Id.* (quoting *Katz, 389 U.S. at 361, 88 S.Ct. at 516* (Harlan, J., concurring)). Thus, we must determine whether Robinson had a subjective expectation of privacy that society would recognize as objectively reasonable.

Our conclusion in *Ford* that the defendant-appellant held no subjective expectation of privacy turned on his purposefully venting the heat from his marijuana cultivation inside the mobile home with an electric blower through holes drilled in the floor. *Id.* In contrast to *Ford,* Robinson did not vent the heat from his marijuana growing operation or deliberately assist the emission of heat in any way. Consequently, we must decide in this case whether inaction can be as revealing regarding the subjective expectation of privacy as action.

The focal issue is whether Robinson had a subjective expectation of privacy in the heat generated by his indoor marijuana cultivation. (FN4) We find none. While

Robinson attempted ***1329** to conceal his marijuana growing operation by conducting it inside his home, the record does not indicate that he affirmatively took any action to prevent the resulting heat from being emitted into the atmosphere above his house. The record shows no consideration for the emitted heat whatsoever until his indictment and knowledge of the FLIR surveillance, which measured solely heat expelled into the atmosphere from Robinson's home. Robinson's inaction regarding the heat generated from his marijuana cultivation demonstrates his lack of concern for it. Thus, we conclude that Robinson has not established a subjective expectation of privacy in this heat emitted from his home.

[2] Even if Robinson had demonstrated a subjective expectation of privacy in the heat emitted from his home, he also would have to establish the objective component of the *Katz* two-part test. Under the objective prong, the proper inquiry is whether the " 'government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " *Ford, 34 F.3d at 996 (quoting Oliver v. United States, 466 U.S. 170, 182-83, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984))*. Therefore, Robinson would have to demonstrate that his privacy expectation in the heat rising from his house would be accepted by society as objectively reasonable.

In validating the visual inspection of

a greenhouse where marijuana was being cultivated within the curtilage of a house, the Supreme Court found that "no intimate details connected with the use of the home or curtilage were observed" during the aerial viewing. *Florida v. Riley, 488 U.S. 445, 452, 109 S.Ct. 693, 697, 102 L.Ed.2d 835 (1989)* (emphasis added). FLIR surveillance cannot measure temperature; it "merely compare[s] the amount of heat radiated from various objects." *Pinson, 24 F.3d at 1057.* "[T]he mere fact that the police have employed relatively sophisticated forms of technological surveillance does not render the surveillance unconstitutional.... The crucial inquiry, as in any search and seizure analysis, is whether the technology reveals 'intimate details.' " (FN5) *Ishmael, 48 F.3d at 855-56* (footnote omitted) (citation omitted) (quoting *Dow Chemical Co. v. United States, 476 U.S. 227, 238, 106 S.Ct. 1819, 1827, 90 L.Ed.2d 226 (1986)); accord Ford, 34 F.3d at 996; Pinson, 24 F.3d at 1059.*

In this case, the FLIR surveillance revealed only that Robinson's house emitted ***1330** significantly more heat than others in the neighborhood of similar size. No revelation of intimate, even definitive, detail within the house was detectable; there was merely a gross, nondiscrete bright image indicating the heat emitted from the residence. (FN6) Such heat detection with thermal imagery is not the "functional equivalent of an X-ray machine in that it allows officers to 'see' within a structure

what it otherwise cannot see with the naked eye." *Ishmael, 48 F.3d at 856.*

[3] Moreover, there was no intrusion whatsoever into Robinson's home because the emitted heat rose from his house and then was measured by the FLIR surveillance. (FN7) See *id.* (holding that the "manner" of detecting heat is "significant in assessing the reasonableness of the intrusion"). Using infrared surveillance to ascertain heat intensity is analogous to the warrantless use of drug-detecting dogs to locate contraband. See *United States v. Place, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110 (1983)* (holding that using police-trained dogs to detect drugs in luggage does not violate the Fourth Amendment). Validating FLIR surveillance of a home, the Eight Circuit found that "[j]ust as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing infrared camera." *Pinson, 24 F.3d at 1058.* Because considerable electric lighting resulting in uncommon heat output is associated with indoor marijuana cultivation, (FN8) unusual heat registered by FLIR surveillance serves as a method of identification.

[4] Thus, we conclude that "[n]one of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy and privacy associated with a home, are threatened by

[FLIR] thermal imagery." *Id. at 1059;* see *Myers, 46 F.3d at 670* (determining that the thermal surveillance of a home was constitutional, the Seventh Circuit concluded that "[a] thermal imaging scan does not intrude in any way into the privacy and sanctity of a home"). Robinson has failed to establish an objective or reasonable expectation of privacy in the heat emitted from his house resulting from the unlawful marijuana cultivation inside, even if he had met the subjective component of the *Katz* test. Significantly, we are unconvinced that society ever would accept use of the Fourth Amendment to shield unlawful activity within one's home when there are noninvasive methods of detecting such criminal activity through legitimate byproducts, such as the heat at issue in this case. We hold that the FLIR surveillance of Robinson's home was not an unreasonable search violative of the Fourth Amendment.

[5][6][7] Robinson's second issue on appeal is his contention that there was insufficient evidence to constitute probable cause for issuing a search warrant. Accordingly, he argues that execution of the allegedly invalid search warrant violated his Fourth Amendment rights, and that the marijuana seized ***1331** should have been suppressed. Whether a search warrant affidavit provides sufficient facts to establish probable cause of a federal crime is a legal question "subject to complete and independent review by this court." *United*

States v. Miller, 24 F.3d 1357, 1360 (11th Cir.1994). We accord great deference to judicial determination of probable cause to issue a search warrant. *United States v. Gonzalez, 940 F.2d 1413, 1419 (11th Cir.1991)*, cert. denied, *502 U.S. 1047, 112 S.Ct. 910, 116 L.Ed.2d 810*, and cert. denied, *502 U.S. 1103, 112 S.Ct. 1194, 117 L.Ed.2d 435 (1992)*. In issuing a valid search warrant under the Fourth Amendment, a judge " 'is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit ..., there is a fair probability that contraband or evidence of a crime will be found in a particular place.' " *Miller, 24 F.3d at 1361* (quoting *Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527* (1983)).

[8][9][10] In this case, Agent West of the Narcotics Division of the Alabama Department of Public Safety, who had investigated narcotics offenses for twenty-two years and who specifically had been involved with search warrants concerning indoor marijuana cultivation, presented an affidavit containing the following facts supporting probable cause for a search warrant for Robinson's home: (1) Robinson ordered thirty high-pressure sodium lights from a California company specializing in indoor growing equipment and paid for them with a cashier's check in excess of $7,000.00, (2) Robinson had purchased growing equipment from this company in the past, (3) based on his experience and training, (FN9) Agent West

knew that high-pressure sodium lights are used for indoor marijuana cultivation and that they consume a large amount of electricity and radiate much heat, (4) subpoenaed electric records for Robinson's residence showed higher electrical consumption (FN10) than for houses of comparable size, (FN11) (5) aerial surveillance with FLIR equipment revealed considerably more heat emanating from Robinson's home than from neighborhood houses of comparable size, and (6) visual inspection of the property revealed an attractive house with a swimming pool in an affluent neighborhood, yet no record of Robinson's having paid state income taxes could be located. To the extent that Robinson claims that the FLIR aerial surveillance constituted an unlawful, warrantless search unavailable to support probable cause for issuance of the search warrant, we have negated that argument in our foregoing analysis.

Notwithstanding the additional evidence obtained from the aerial FLIR surveillance, we note that the weight of the other evidence would have provided sufficient probable cause for issuance of the search warrant in question. Cf. *United States v. Olson, 21 F.3d 847, 849* (8th Cir.) ("We find that there was sufficient evidence, independent of the information obtained through the use of the FLIR device, to support a finding of probable cause."), cert. denied, – *U.S.* —, *115 S.Ct. 230, 130 L.Ed.2d 155 (1994); United States v. Deaner, 1 F.3d 192, 197* (3d Cir.1993)

(holding that, even without the FLIR surveillance evidence, the rest of the factual information in the affidavit would have supported probable cause for issuance of the search warrant to determine if marijuana was being cultivated in a private residence); *United States v. Kerr, 876 F.2d 1440, 1443* (9th Cir.1989) (holding that, even eliminating the infrared inspection, the other factual evidence supported probable cause to issue the search warrant for a shed on residential property to determine if marijuana was being ***1332.** cultivated inside); see also *United States v. Barnett, 989 F.2d 546, 557* (1st Cir.) (holding that, although infrared heat-detecting device used in aerial surveillance was operated by state police trooper with little experience in the equipment such that the heat readings for the residential property were questionable, the other factual data presented in the affidavit supported probable cause for a search warrant to investigate the manufacture of methamphetamine), cert. denied, *— U.S. —, 114 S.Ct. 148, 126 L.Ed.2d 110,* and cert. denied, *— U.S. —, 114 S.Ct. 149, 126 L.Ed.2d 110* (1993). The thermal imagery evidence in addition to the cumulative impact of the other evidence amply demonstrated a fair probability that marijuana cultivation was occurring in Robinson's house. Therefore, Robinson's challenge to the sufficiency of the evidence to support probable cause for issuance of a search warrant for his house is meritless.

III. CONCLUSION

Robinson challenges the FLIR surveillance used to detect heat emitted from his house and also the sufficiency of the evidence to support probable cause for issuance of the search warrant that culminated in seizing marijuana that he was cultivating inside his home. As we explained herein, the aerial FLIR surveillance did not violate the Fourth Amendment, and the search warrant was valid because it was based upon sufficient evidence to provide probable cause. We AFFIRM.

EDMONDSON, Circuit Judge, concurring:

I concur in the result and in the opinion, except for the discussion (at 3314-3315) of whether Robinson had a subjective expectation of privacy in the heat generated by his indoor marijuana cultivation. On that question, I admit to considerable doubt.

I do not say that today's court is wrong in its conclusion on the point. But, I do say that the answer is less than clear to me, considering especially that the court stresses the inaction of a homeowner as the decisive element. Because I believe the subjective intent issue could be decided either way without affecting the outcome of this case, I decline to decide the unnecessary and, for me, delicate question of subjective intent.

FN1. At the time of his involvement with Robinson's case, Agent West had twenty-two years of experience in enforcing state and federal drug laws.

FN2. FLIR thermal imaging is a process whereby differences in heat emissions are measured and reflected on a videotape. Heat concentration is indicated on a videotape on a spectrum of light to dark, with bright white showing intense heat. Increasingly, law enforcement personnel are using FLIR thermal imaging to detect indoor marijuana growing operations.

FN3. At the suppression hearing, Agent West testified that the first floor of Robinson's home contained "a cloning room" with "a large number of [marijuana] plants," and that three upstairs bedrooms were "full of [marijuana] plants with lights." R3-9. A consensual search of the prefabricated metal building revealed no evidence of marijuana cultivation there.

FN4. By isolating the heat emitted from Robinson's indoor marijuana cultivation, we recognize that we differ from the Fifth Circuit's analysis of the subjective expectation of privacy in *Ishmael*. Although *Ishmael* involved deliberate venting of the heat resulting from marijuana cultivation in a large steel building in an open field through a continuously operating exhaust fan, the Fifth Circuit rejected a "heat waste analogy," *Ishmael, 48 F.3d at 854*, and

endorsed a "balance of the evidence" rationale, *id. at 855*, to find that the overall attempts to conceal the marijuana cultivation satisfied the Katz subjective expectation of privacy. We disagree because the issue with thermal imagery is the subjective expectation of privacy in the emitted heat, the only measurement of the FLIR, allegedly unconstitutional search at issue in this case.

We also decline to follow the Fifth Circuit's use of *California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210* (1986), to support its reasoning regarding the subjective expectation of privacy as to thermal imagery. *Ishmael, 48 F.3d at 854.* We distinguish *Ciraolo* factually and analytically because it focuses on the object of the criminal conduct, the marijuana cultivation. While the Court found that enclosing a backyard with a six-foot outer fence and a ten-foot inner fence to obscure marijuana growing manifested subjective intent to maintain privacy concerning unlawful marijuana cultivation, albeit unreasonable under the objective test, *Ciraolo* did not involve surveillance that detected only heat resulting from indoor marijuana cultivation. Consequently, the Court did not address the object of the search at issue in this case, the heat.

Moreover, outdoor and indoor marijuana cultivation are not analogous. Cases relating to outdoor marijuana cultivation necessarily involve actual viewing of the criminal

activity. Indoor marijuana cultivation creates byproducts of the criminal activity, such as heat, which may be isolated to determine the subjective expectation of privacy in a particular byproduct. See *Ford, 34 F.3d at 995* (finding that affirmative venting of excess heat generated from indoor marijuana cultivation did not exhibit an expectation of privacy in the heat emitted from the mobile home). By ignoring this factual and analytical distinction, the Fifth Circuit has interpreted *Ciraolo* too broadly by overextending the scope of the first prong of the *Katz* test.

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821).

***1332.** FN5. While we disagree with the Fifth Circuit's analysis of the subjective expectation of privacy, we endorse its reasoning under the objective component of the Katz test, under which it concluded that the expectation of privacy in heat detected by thermal imagery was not reasonable. *Ishmael, 48 F.3d at 855-57.*

FN6. In denying Robinson's suppression motion, the district court found that [t]he FLIR detects only the presence of heat emanations. The FLIR does not detect the source of the heat nor provide any information regarding activity within an enclosed space such as defendant's house. Based on the information before it, the Court does not consider the use of the FLIR to be so intrusive as to constitute an unlawful search.

R1-59-2.

FN7. Heat detection through infrared surveillance is conducted through " 'a passive, nonintrusive instrument,' " which " 'does not send any beams or rays into the area on which it is fixed or in any way penetrate structures within that area.' " *Ishmael, 48 F.3d at 856* (quoting *United States v. Penny-Feeney, 773 F.Supp. 220, 223* (D.Haw.1991), aff'd sub nom. on other grounds, *United States v. Feeney, 984 F.2d 1053* (9th Cir.1993)); see *Myers, 46 F.3d at 669* (finding that thermal scanning or surveillance "does not penetrate the viewed object, nor does it emit rays or beams of any type"). At the suppression hearing, Agent West testified that "infrared picks up heat from the house, it does not intrude in any way into the residence or whatever, it's what is released from the residence." R3-19.

FN8. See *United States v. Robertson, 39 F.3d 891, 894 & n. 4* (8th Cir.1994) (acknowledging and listing "[n]umerous cases" that have

"noted that high intensity lights are used to grow marijuana indoors and generate excess heat"), cert. denied, – *U.S.* —, *115 S.Ct. 1812, 131 L.Ed.2d 736* (1995).

FN9. " '[O]pinions and conclusions of an experienced agent regarding a set of facts are properly a factor in the probable cause equation' " for issuing a search warrant. *United States v. Motz, 936 F.2d 1021, 1024* (9th Cir.1991) (alteration in original) (quoting *United States v. Burnes, 816 F.2d 1354, 1357* (9th Cir.1987)).

FN10. Evidence of an extremely high power bill is one factor justifying issuance of a warrant to search for indoor marijuana cultivation. *Mills v. Graves, 930 F.2d 729, 732-33* (9th Cir.1991).

FN11. Robinson maintains that houses used by Agent West are not comparable in size because they are 2,800 square feet, while his house is approximately 4,200 square feet. This argument is inconsequential to our decision. Our review standard requires us to view the evidence in the light most favorable to the prevailing party, the government. Accordingly, we must take the house size stated by the investigating agent over those alleged by Robinson.

EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-6951 and 92-6991

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THEODORE ROBINSON,
Defendnat-Appellant.

On Appeal from the United States
District Court for the
Middle District of Alabama

BEFORE: EDMONDSON and BIRCH, Circuit Judges, HILL, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Theodore Robinson, is DENIED.

ENTERED FOR THE COURT:

/s/ EDMONDSON
UNITED STATES CIRCUIT JUDGE